Supreme Court U.S.
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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

COY PHELPS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit U.S. Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

COY PHELPS 78872-011
In Pro Se
FMC-DEVENS
P.O. Box 879
Ayer, Massachusetts 01432

QUESTIONS PRESENTED

Whether the Ninth Circuit U.S. Court of Appeals can decline to hear a civil appeal case in which the U.S. District Court rendered a final order and Judgment and when the petitioner filed a timely notice of appeal and paid the required filing fee, and submitted the Appellant Brief and a response by the Respondents was filed.

STATEMENT OF PARTIES

All parties of this action are listed in the caption.

I

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in *Phelps v. State*, No. 05-17348, was filed November 13, 2006, is unreported and is reproduced in the Appendix at App. 1. The order in the United States District Court for the Eastern District of California in *Phelps v. State*, No. CIV-S-03-2481 MCE/JFM P, filed November 18, 2005, is unreported and is reproduced at App. 3. The order and findings and recommendations in the United States District Court for the Eastern District of California in *Phelps v. State*, No. CIV-S-03-2481 MCE/JFM P, filed October 26, 2005, is unreported and is reproduced at App. 5.

II

JURISDICTION AND AUTHORITY

This court has jurisdiction under 28 U.S.C. § 2101 and Rules 10 et seq. of the U.S. Supreme Court Rules.

The Ninth Circuit U.S. Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

The U.S. District Court had jurisdiction under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 1971, 403 U.S. 388 and 28 U.S.C. § 1331, § 1343, and 42 U.S.C. § 1988 (Common Law).

III

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend I provides:

> Congress shall make no law respecting a establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

28 U.S.C. § 1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

IV

STATEMENT OF THE ISSUES

The Ninth Circuit "declined to hear the case" without addressing the merits of the case and without rendering a judgment.

V

STATEMENT OF THE FACTS

On November 26, 2003, the Petitioner filed a civil rights complaint in the U.S. District Court for the Eastern District of California alleging that the defendants had violated his rights under the U.S. Constitution, California State Constitution, Federal law, and California State laws. Petitioner paid his fees.

The District Court dismissed after a pre-trial conference.

Petitioner filed a timely notice of appeal and paid the required appeal fees and filed on Appellant Brief on November 2, 2005.

The defendants responded.

In November of 2006, the Ninth Circuit issued a Memorandum stating that it "declined to hear the case." The court did not express any reason and did not address any merits of the case.

VI

WHY THIS PETITION SHOULD BE GRANTED

This case is a civil rights case,

28 U.S.C. § 1291 creates a liberty interest to have a case reach a final determination by the highest courts.

The First Amendment of the U.S. Constitution provides the citizen the right to petition the government for redress of grievances. The right to appeal is implicit in the Petition clause.

Once the court accepted the filing fee, a contract was in effect which stated in essence, "I paid, now deliver."

Criminal defendants have the right to appeal (*Hardy v. U.S.*, 375 U.S. 277 (1964)). Under the equal protection clause of the U.S. Constitution a coexisting right exists for the non-criminal litigant.

No court held that the case of the Petitioner was meritless, frivolous, or did not state a claim.

VII

CONCLUSION

The Ninth Circuit should have heard the case and should have made a judgment or expressed an opinion on the merits of the case.

This Petition for a Writ of Certiorari should be granted.

DATE: January 22, 2007

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COY PHELPS, Plaintiff-Appellant, v. STATE OF CALIFORNIA; et al., Defendants-Appellees.	No. 05-17348 D.C. No. CV-03-02481-MCE MEMORANDUM* (Filed Nov. 13, 2006)

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding

Submitted November 6, 2006**

Before: LEAVY, GOULD, and CLIFTON, Circuit Judges.

Coy Phelps appeals pro se from the district court's summary judgment in favor of the City of Lodi, and its employees, as well as federal and private citizen defendants in his civil rights action. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994) (per curiam), and we affirm.

Because Phelps' opening brief does not challenge the legal basis of the district court's summary judgment, or its

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

earlier order dismissing the federal and private citizen defendants, he has waived the right to challenge those orders. *See Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

COY PHELPS,

Plaintiff,

v.

STATE OF CALIFORNIA, ET AL.,

Defendants. /

No. CIV-S-03-2481 MCE/JFM P

ORDER

(Filed Nov. 18, 2005)

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On October 26, 2005, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Plaintiff has filed objections to the findings and recommendations and the City of Lodi defendants have filed a reply to plaintiff's objections.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed October 26, 2005, are adopted in full;

2. Defendants' June 24, 2005 motion for summary judgment is granted; and

3. The Clerk of the Court is directed to enter judgment in this action in accordance with this order and this court's September 8, 2004 order.

DATED: November 17, 2005

/s/ [Illegible]
MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

COY PHELPS,

Plaintiff,

vs.

STATE OF CALIFORNIA, et al.

Defendants. /

No. CIV S-03-2481 MCE JFM P

ORDER AND FINDINGS AND RECOMMENDATIONS

(Filed Oct. 26, 2005)

Plaintiff is a federal prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. By order filed September 8, 2004, all of the claims in plaintiff's second amended complaint were dismissed with the exception of plaintiff's claims against the City of Lodi defendants.[1] With respect to these defendants, plaintiff

[1] On September 22, 2004, an answer to plaintiff's second amended complaint in this action on behalf of defendants City of Lodi, City of Lodi Police Department, Chief Jerry Adams, and "1 Unknown Female Officer." On August 4, 2005, plaintiff filed a motion for service of summons and the second amended complaint on R. L'Hoir, contending that said individual is the person identified in the second amended complaint as "One Unknown Female Police Officer of the Lodi, California Police Department." By order filed August 26, 2005, counsel for the Lodi defendants was directed to inform the court whether service would be waived for said officer and whether counsel would tender a defense for said officer. On September 13, 2005, counsel filed a letter stating that Ms. L'Hoir separated from City service in October 2001 and therefore the City could not waive service of process on her behalf. Counsel also represented that a decision regarding a tender of defense for Ms. L'Hoir would have to be made by the City Council. Despite these representations, counsel has filed a motion for summary judgment on behalf of four defendants associated with the City of Lodi, including the unnamed female police officer now identified as R. L'Hoir. On the basis of the pleadings already filed by the Lodi defendants in this action, the court finds that counsel for the Lodi defendants is representing the

(Continued on following page)

claims that his constitutional rights were violated when he was arrested for failing to comply with the registration requirements of California Penal Code § 290 based on an expunged sex offense conviction and when information that plaintiff was a convicted sex offender was improperly disseminated in the community. This matter is before the court on said defendants' motion for summary judgment. Defendants contend that this action is barred by the statute of limitations and, in the alternative, that they are entitled to qualified immunity from liability.

SUMMARY JUDGMENT STANDARDS UNDER RULE 56

Summary judgment is appropriate when it is demonstrated that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Under summary judgment practice, the moving party

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

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unknown female officer now identified as Officer L'Hoir. Accordingly, the court will not make further orders for service of process on Officer L'Hoir and the court will make findings and recommendations on the motion for summary judgment as presented by all four defendants, including the unknown female officer now identified as Office L'Hoir. For these reasons, plaintiff's September 15, 2005 motion to compel disclosure of Officer L'Hoir's address for service of process will be denied.

> any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" *Id.* Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See Id.* at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. *See* Fed. R. Civ. P. 56(e); *Matsushita*, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of

the suit under the governing law, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *see Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's notes on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. *See Anderson*, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. *See Matsushita*, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *See Richards v. Nielsen Freight Lines*, 602 F.Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some

metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted).

On August 26, 2005, the court advised plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir. 1988) (en banc), *cert. denied*, 527 U.S. 1035 (1999), and *Klingele v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988). In the same order, plaintiff was given an opportunity to file a supplemental opposition to defendants' motion. On September 21, 2005, plaintiff filed a supplemental opposition to defendants' motion and on September 27, 2005, defendants filed a reply to plaintiff's supplemental opposition.[2]

ANALYSIS

As noted above, defendants seek summary judgment on the ground, *inter alia*, that this action is barred by the statute of limitations. California law determines the applicable statute of limitations in this § 1983 action, *see Wilson v. Garcia*, 471 U.S. 261, 268-71 (1985), which is one year. *See* Cal. Code Civ. Proc. § 340(3); *see also Elliott v. City of Union City*, 25 F.3d 800, 802 (9th Cir. 1994). California law also provides the applicable tolling provisions

[2] Plaintiff objects to defendants' reply as "improper." (Object to Defendants Reply Made on 9/27/2005). Reply briefs are specifically authorized by the Local Rules of this Court, *see* Local Rule 78-230(m), and this court's August 26, 2005 order specifically granted defendants seven days to file a supplementary reply brief. Plaintiff's objection is without merit and is overruled.

"including equitable tolling when not inconsistent with federal law." *Fink v. Shedler*, 192 F.3d 911, 914 (9th Cir. 1999). Under California law, the statute of limitations is tolled during the pendency of criminal proceedings that followed the incident at bar. *See Harding v. Galceran*, 899 F.2d 907, 908 (1989) (Provisions of California Government Code § 945.3 apply to toll limitations period while criminal charges are pending against "potential plaintiff.") California law also provides statutory tolling of the civil for up to two years during a period of incarceration. *See* California Civil Code § 352.1; *see also Fink*, *id.*

Federal law governs when plaintiff's § 1983 claims accrued and when the limitations period begins to run. *Cabrera v. City of Huntington Park*, 159 F.3d 374, 379 (9th Cir. 1998). Under federal law, "the claim generally accrues when the plaintiff 'knows or has reason to know of the injury which is the basis of the action.'" *Id.* (citations omitted).

Plaintiff's claims against the Lodi defendants arise from an alleged unlawful arrest of plaintiff for violation of California Penal Code § 290, a law requiring convicted sex offenders to register with local officials, and the consequences that allegedly followed that arrest. Except as expressly noted, the following facts relevant to the events at bar are undisputed. Plaintiff was arrested on October 5, 1999 for failing to register in violation of California Penal Code § 290. (Exs. A and B to Declaration of Lauralee Waddell in Support of Defendants' Motion for Summary Judgment, filed June 24, 2005; Opposition to Summary Judgment, filed September 21, 2005 (hereafter "Supplemental Opposition," at 5.) Plaintiff was arrested, taken to the county jail, and released on his own recognizance. (Supplemental Opposition, at 5.) The charges were

dismissed by the San Joaquin County Superior Court in December 1999.[3] Plaintiff contends that he began to suffer harassment within forty-eight hours of the arrest. (*See* Supplemental Opposition, at 6.)[4]

At the time of the arrest, plaintiff was on federal probation. (Supplemental Opposition, at 2-3.) He apparently remained out of prison until sometime following his early 2001 arrest on federal criminal charges. (*See* Second Amended Complaint, at 27; Supplemental Opposition, at 1 and *passim*.)

Plaintiff claim for wrongful arrest arose on October 5, 1999, and his claim for the harassment that followed therefrom arose shortly thereafter.[5] The limitations period was tolled until not later than December 22, 1999, after the criminal charges were dismissed, and the limitations period expired one year later in December 2000. This action was not filed until November 2003 and is therefore

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[3] Citing the Second Amended Complaint, filed February 2, 2004, defendants assert that the criminal charges were dismissed on December 6, 1999. Plaintiff does not dispute that charges were dismissed on that date. It is clear that they were dismissed sometime before December 22, 1999, when plaintiff signed a § 290 registration form. (Ex. E to Waddell Declaration; Second Amended Complaint, at 18th page after cover sheet (hereafter the pages of the second amended complaint will be identified by their sequential position after cover sheet, with page 1 identified as the page after the cover sheet that sets forth allegations of the court's "Jurisdiction and Authority").

[4] In his second amended complaint, plaintiff alleges that the harassment began "within two weeks after the arrest." (Second Amended Complaint, at 19.)

[5] Plaintiff does not provide a precise date on which he was allegedly told that the harassment he was suffering was the result of information disseminated by Officer L'Hoir, but he does state in his supplemental opposition that it was before he first changed residences as a result of the harassment. (Supplemental Opposition, at 6.)

barred by the statute of limitations.[6] For that reason, the Lodi defendants are entitled to summary judgment.

In accordance with the above, IT IS HEREBY ORDERED that:

1. Plaintiff's September 15, 2005 motion to compel is denied; and

IT IS HEREBY RECOMMENDED that:

1. Defendants' June 24, 2005 motion for summary judgment be granted; and

2. Judgment be entered in this action in accordance with any order of the district court adopting these findings and recommendations and the district court's September 8, 2004 order.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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[6] The tolling provisions of California Civil Code § 352.1 have no application to this action, since plaintiff was not re-incarcerated until early 2001, after expiration of the limitations period.

DATED: October 25, 2005.

/s/ [Illegible]
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

COY-PHELPS,	**JUDGMENT IN A CIVIL CASE**
v.	
JERRY RIVERS, ET AL.,	**CASE NO: 2:03-CV-02481-MCE-JFM**

XX – **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 11/18/05

Jack L. Wagner
Clerk of the Court

ENTERED: **November 18, 2005**

by: /s/ – M. Krueger
Deputy Clerk